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In The
Supreme Court of the United States

REGINALD WILKINSON, Director, et al.,

Petitioners,

v.

WILLIAM DWIGHT DOTSON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF ON BEHALF OF 2,974 FORMER AND CURRENT OHIO INMATES AND NAMED PLAINTIFFS IN MICHAEL V. GHEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Heck v. Humphrey, 512 U.S. 477 (1994), holds that a prisoner cannot advance a claim under 42 U.S.C. § 1983 where success on that claim would "necessarily imply the invalidity of his conviction or sentence . . . unless . . . the conviction or sentence has already been invalidated." (*Heck*, 512 U.S. at 487). This has come to be known as *Heck's* "favorable termination requirement." The following questions are presented.

1. When a prisoner invokes § 1983 to challenge parole proceedings, does *Heck's* "favorable termination requirement" apply where success by the prisoner on the claim would result only in a new parole hearing and not necessarily guarantee earlier release from prison?

2. Does a federal court judgment ordering a new hearing necessarily imply the invalidity of the decision at the previous parole hearing for purposes of *Heck v. Humphrey*.

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INTEREST OF *AMICI CURIAE*

2,974 currently incarcerated or former Ohio inmates respectfully submit this *amici curiae* brief pursuant to Sup. Ct. R. 37.3[1] in support of the Sixth Circuit's *en banc* decision[2] and the causes of Respondents William Dwight Dotson and Rogerico Johnson.

Respondent Dotson is one of 2,974 Named Plaintiffs in a complex and all-encompassing class action suit titled *Michael v. Ghee*,[3] challenging procedures of Ohio's Adult Parole Authority [hereafter *Parole Board*]. *Michael v. Ghee* was filed July 20, 2001. This litigation is nearly decisional. An indefinite stay has been imposed pending the outcome of *Wilkinson v. Dotson*. If Petitioners' prevail, our lawsuit could be dismissed.

This brief can be of assistance because of new evidence developed in *Michael v. Ghee* uncovering Parole Board practices. To avoid redundancy, our arguments are framed by authority from Ohio's Supreme Court construing parole guidelines, Department Policies, Parole Guidelines, parole panel decisions, one Parole Board affidavit

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici* represents that it authored this amici brief, and no counsel for any party in this case authored this brief in whole or in part. Further, no entity other than *amici*, their members or their counsel made a monetary contribution to the preparation or submission of this brief. Written consent for amici curiae participation was granted by counsel of record for all parties. Letters reflecting this consent have been filed with the Clerk pursuant to Sup. Ct. R. 37.2(a).

[2] *Dotson v. Wilkinson*, 329 F. 3d 463 (6th Cir. 2003) (en banc).

[3] *Michael v. Ghee*, Case #3:01CV7436, U.S. District Court, N. D. of Ohio, hereafter *Michael v. Ghee*.

and a class action trial court decision on state issues. Discussion of U.S. case law has been held to a minimum.

SUMMARY OF ARGUMENT

Heck's maxim dictates that a prisoner cannot advance a claim under 42 U.S.C. § 1983 (hereafter *§ 1983*) where success on the merits would "*necessarily imply*" invalidity of the conviction or sentence. Ohio's Parole Board is virtually autonomous and ungovernable. This agency's intervening presence and broad discretion derails any causal connection between success in federal court and the possibility of invalidating any state decision. A favorable ruling for an inmate by Ohio's Supreme Court, enforced by the trial court Judge one month later, failed to result in a prompt discharge or even a routinely granted parole.[4] Such is the power of Ohio's Parole Board, fourteen months and three parole hearings were required before Gerald Houston left prison. Claims should not be consigned to the habeas corpus statute on a speculative chance of engaging its relief. The term *necessarily* means *inevitable*. Given Gerald Houston's recent experience, we cannot imagine a parole related decision issued by *either* a state or federal court that could navigate Ohio's parole process and *inevitably result* in a new sentence or conviction.

[4] *See Layne v. Ohio Adult Parole Authority*, 97 Ohio St. 3d 456 (Oh. 2002), (hereafter *Layne*.) Gerald Houston should have served 10 to 15 years. *See Layne*, 97 Ohio St. 3d at 460. At the time of deciding *Layne*, he had served 20 years and 10 months. In January of 2003, Allen County Judge Warren ordered a new hearing consistent with *Layne*. On March 22, 2004, 14 months later, Mr. Houston was paroled.

The *favorable termination requirement* of *Heck* has been pounded and molded in the State's prosecutorial presses until it has been separated completely from its malicious prosecution context and transformed into its own absolute and insular maxim. In its finished state, this clause has emerged to become a frighteningly efficient means for performing one chilling task – dismissing inmate complaints without addressing their merits. Two District Court decisions on this docket attest to its resourcefulness as legal weaponry. *Heck's favorable termination requirement* needs to be abandoned. Even a tightly construed remnant of this clause will continue to wreck havoc in legal trenches.

There is poetic justice in having two inmates before this Court. Each claim illustrates a major ailment in administration of Ohio's criminal law. Dotson's case exposes a macro trend of Parole Boards to surreptitiously impose a sentencing scheme of their own creation upon inmates, reducing judicial decrees to vain acts in a wholesale, sweeping fashion. Johnson's case describes how a single judgment can be compromised, showing on a micro scale how judicial authority is overruled. Placed side by side, a picture emerges of the full process. On a Richter scale measuring contempt for the Judiciary, these facts rival the noxiousness of *Mapp v. Ohio*.[5] We urge this Court to adopt a finding not contemplated when certiorari was granted. While inmates have no vested interest in parole, every inmate deserves a *meaningful parole hearing*. When Parole Boards have authority to continue an inmate ten years or for any period that is not remedial, inmates

[5] 367 U.S. 643 (1961).

should have a vested *and protected* liberty interest in a meaningful parole hearing mandating the procedural safeguards described in *Wolff v. McDonnell*.[6] *Wolff's* protections are urgently needed to restore judicial primacy and curb parole abuses.

ARGUMENT I – CHALLENGING ELIGIBILITY CRITERIA

If a prisoner's claim for relief cannot be granted under the restrictive habeas statute, but does qualify under the civil rights statute due to a violation of the U.S. Constitution's Ex Post Facto Clause, this claim should be cognizable under § 1983.

Postponing Parole Eligibility from 2000 to 2012

Dotson was denied parole after serving 15 years. Under guidelines in force at the time of his conviction, he was entitled to another hearing within 5 years. In 1998, new guidelines were adopted and applied retroactively. Dotson must now serve 17 years before receiving serious parole consideration. He is challenging the eligibility criteria governing his suitability for release. Dotson's claim should be cognizable under § 1983 for two reasons: (1) under the restrictive habeas statute, purely prospective relief aimed at forcing prison officials to follow different procedures in the future cannot be granted; and (2) the merits of Dotson's case – his parole suitability – are not part of his claim; hence, there is no *pertinent* state decision to invalidate.

[6] 418 U.S. 539, at 563-570 (1974), hereafter *Wolff*.

Even the Sixth Circuit's *en banc* dissent found merit in Dotson's claim.

> "His [i.e. Dotson's] appeal is a classic claim for using the wrong procedures, not for reaching the wrong result. Further support for this conclusion comes from the fact that Dotson's lawsuit could just as easily have been cast as a class action claim challenging the retroactive application of Ohio's parole eligibility guidelines. This would have placed the case in the same posture as that presented in *Wolff* [*Wolff v. McDonnell*, 418 U.S. 539 (1974)], requesting prospective injunctive relief that seems clearly permissible under the Court's rule."[7]

Dotson's claim *is* the nucleus of *Michael v. Ghee*. His predicament – receiving a Parole Board continuance exceeding his trial court minimum sentence – affects every category of crime and every kind of Ohio prisoner including first time offenders.

Granting Administrators Authority to Overrule Judges

In federal court, it would be unthinkable to apply a sentencing guideline suitable for attempted murder when the offender is guilty of assault. In Ohio, parole panels have authority to make upward departures of this kind, achieving a result indirectly that the state could not

[7] *Dotson v. Wilkinson*, Appendix A, at p. 29a.

realize in court.[8] Provisions conferring this authority appear below.

> "The guidelines set forth the customary range of time to be served before release for various combinations of offense (seriousness) and offender (risk of recidivism) characteristics. The Parole Board may depart from the applicable guideline range for 'good cause' provided the specific written reasons for the departure are recorded and a copy given to the offender.
>
> "The Parole Board intends that the guideline ranges apply to 'heartland' cases, the typical cases that embody the conduct and circumstances that fall within the particular guideline range. In an atypical case, a case to which a particular guideline linguistically applies but where the conduct or circumstances differ significantly from the norm in an important way, the Board may depart from the guideline range." (p. 70)
>
> "(a) *In General*. The Parole Board may render a decision outside the guidelines for good cause provided that the offender is furnished, in writing, with a specific explanation for such action. It is in the Parole Board's discretion to render a decision above or below the guidelines provided that there exists an aggravating or mitigating factor(s) sufficient to warrant a decision and provided the specific reasons for the decision are adequately explained in the notice of the Parole Board's action . . . "[9] (p. 75)

[8] Petitioners concede this authority to make departures. *See* Brief for Petitioners at p. 7.

Petitioners offer no apologies for departing from court decrees. A blessing from this Court has been advanced for exercising this authority.[10] It is axiomatic that a parole candidate must first enter their assigned guideline before becoming entitled to serious release consideration. This rule is rigidly applied.[11] An upward departure bonds parole eligibility to a new crime. This new crime engages a higher guideline. Parole eligibility *and* suitability are on hold for the duration of the guideline engaged by the trial court conviction. In this manner, parole panels overrule court judgments with a conviction of their own making, coupled

[9] *See* Amici Brief for Respondents, Appendix IV, Ohio Parole Board Guidelines, at p. 70 and 75. An excerpt of these guidelines is in the Docket (*See* Joint Appendix pp. 27-30, Exhibits D, E) and Petitioners reference the entire manual via a website address (*See* Brief for Petitioners at p. 6, fn. 2). Amici's certified copy of the parole guidelines includes hand written notations and numerous deletions missing from the online version. Amici further requests permission to make the *Ohio Parole Board Decision* form, in use from 1998 to 2002, part of the record as Appendix I; and the *Ohio Parole Board Decision Sheet*, in use from 2003 to present, part of the record as Appendix II. For good cause, the guidelines are much more meaningful when examined with these forms. No prejudice can accrue to Petitioners, for they have designed these forms and use them. Appellate courts may consider judicially noticeable government documents not advanced below. *See* Brief for Petitioners at p. 8 fn. 3 [where two government documents are added as a supplement.]

[10] Brief of Petitioners, at pp. 20-22. ["Thus, parole officials exercise sentencing discretion and make sentencing decisions."]

[11] *See Michael v. Ghee*, Document No. 209, Plaintiffs' Exhibit 132, Affidavit of George Brehm (Exhibit I) Mr. Brehm served 116 of 120 months [96%] of his minimum guideline. Because he was not within his guideline, he did not receive serious consideration for parole.

with an amended sentence postponing parole consideration for years. Upward departures invalidate the trial court's parole eligibility term, part of the sentence. *Heck's* maxim is being challenged – by the Parole Board, not by inmates.

Embedded State Decision Construing Parole Eligibility

Inmates challenged Parole Board authority to make upward departures. Three cases were consolidated and heard by Ohio's Supreme Court. After parole hearings, each inmate's assigned guideline matched a crime other than their conviction, requiring substantially more time before qualifying for parole.[12] *Layne* construed the term *eligible for parole* in former R.C. § 2967.13(A).[13] With its syllabus in ital, *Layne* held:

> "We recognize that the APA has wide-ranging discretion in parole matters. [citations deleted] However, that discretion must yield when it runs afoul of statutorily based parole eligibility standards and judicially sanctioned plea agreements. *In any parole determination involving indeterminate sentencing, the Ohio Adult Parole Authority must assign an inmate the offense score that corresponds to the offense or offenses of conviction.*"[14]

[12] *See Layne*, 97 Ohio St. 3d 458-459 [Wiley Layne], 459-460 [Houston] and 461 [Lee].

[13] *See Layne*, 97 Ohio St. 3d 456, 463-464 (Ohio 2002).

[14] *Layne*, 97 Ohio St. 3d at 464.

Given *Layne's* holding, you would expect clauses authorizing upward departures to be deleted. Indicative of the autonomous and ungovernable nature of Ohio's Parole Board, the authority to make upward departures in offense categories remains fully intact.

Trial Court Eligibility Compared to Guideline Eligibility

Ohio's parole guidelines are pitched high. This condition is exacerbated by upward departures. To discover how high they are pitched and how they are further impacted by upward departures, a survey of 600 clients was conducted. This survey first noted the average time required by the court's minimum sentence. Next, this trial court sentence was compared to three benchmarks: (1) the average time required for entering the guideline *matching* the court conviction; (2) the average time required for entering an inmate's *assigned* guideline; and (3) the average time required for *receiving a meaningful hearing* within the assigned guideline. The results even surprised us.

> * In 534 out of 600 cases [89%], the minimum court sentence averaged 6.4 years. Entry into the matching guideline was 11.7 years. After serving 6.4 years for a judge, inmates had to serve *another* 5.3 years for an administrator before they *entered* the guideline matching their offense of conviction.[15]

[15] *See Michael v. Ghee*, Document No. 196, Charts and Graphs, Roman Numeral I.

* For the remaining 66 [out of 600] cases where sentences penetrated or equaled the matching guideline, upward departures occurred in all cases.[16]

* In 600 cases, the minimum sentence averaged 6.3 years. The average time required for entering the *Assigned Guideline*, a term reflecting both upward departures and matching guidelines, was 15.2 years.[17]

* In 526 out of 600 cases – 74 panels provided no answer, only "to be determined" – the minimum sentence averaged 6.1 years. The average time required for receiving a meaningful hearing was 18.5 years. This additional 12.4 years exceeds the minimum sentence by over 200%.[18]

Dotson was entitled to serious parole consideration in 1995. After serving 25 years in 2005, he *will not* receive serious consideration because he has not served the 32 years now required *by an administrator*. Without any show of good cause or any cause at all, inmates are continued because they are not serving time in their assigned guideline. Even in 2012, there is no guarantee that Mr. Dotson will receive serious parole consideration. In our survey of 600 clients, we found that two out of three inmates did not receive serious parole consideration until

[16] *See Michael v. Ghee*, Document No. 196, Charts and Graphs, Roman Numeral II.

[17] *See Michael v. Ghee*, Document No. 196, Charts and Graphs, Roman Numeral II.

[18] *See Michael v. Ghee*, Document No. 196, Charts and Graphs, Roman Numeral III.

they reached *the end* of their guideline.[19] In 2005, Mr. Dotson could easily be continued to 2015, which means that he will have to wait 20 years before receiving serious parole consideration. None of this time is assessed because of a finding that Mr. Dotson is not suitable for parole. *Parole Suitability is not even reached*. This time is dictated by a chart with drawn guidelines, whose precise boundaries lack any discernible basis or rationale beyond the obvious; these time-lines stretch prison sentences.

High pitched guideline ranges and upward departures structurally lock in vast amounts of time, overruling parole consideration on the trial court's terms. Attesting to Parole Board autonomy, the hearing ordered by a judge and made a part of the sentence has been degraded from meaningful release consideration to mere paper eligibility. The premise supporting these guidelines presupposes that the judge had no factual findings or legal reasons for granting an inmate parole after serving their minimum sentence. A new substantive formula for parole eligibility and suitability has been created. Guidelines and upward departures erect a *high hurdle* before discretion can be exercised.[20] The risk of an increased sentence is substantial. If § 1983 cannot be used to challenge this practice, administrators will continue exercising this *ultra vires* authority and do so with impunity.

[19] *See Michael v. Ghee*, Document No. 196, Charts and Graphs, Roman Numeral IV. [66% of inmates placed in high end of guideline.]

[20] *See Miller v. Florida*, 482 U.S. 423, 432 (1987).

ARGUMENT II – CHALLENGING SUITABILITY CRITERIA

Suitability criteria – whether a decision's factual basis is fitting and proper – is analogous to eligibility criteria. A claim alleging *ultra vires* acts by administrators coupled with a request to follow new procedures (i.e. a meaningful hearing) *in the future* should qualify under § 1983, because the habeas statute cannot be engaged.

Embracing and Generating Erroneous Records

At Johnson's review, the Parole Board Member based her decision on "the inclusion of offenses for which plaintiff had never been convicted"[21] or "even charged, in violation of the Code's permissible considerations,"[22] and "the inclusion of prison conduct reports which did not exist."[23] Both kinds of erroneous records are highly prejudicial to a parole candidate. Johnson was not allowed to speak or ask questions, although Ohio's Code requires parole panels to consider oral or written statements.[24] At this hearing, Johnson was continued ten years.

Reflective of autonomy, parole panels and prison record offices embrace and occasionally fabricate erroneous records. Irrefutable evidence must bow to internally generated documents. Certified court records were laboriously gathered to corroborate affidavits and prove this phenomenon. One panel transformed an arrest into a prior

[21] Appendix D, *Johnson v. Ghee*, at p. 53a.

[22] Appendix A, *Dotson v. Wilkinson*, at p. 6a.

[23] Appendix D, *Johnson v. Ghee*, at p. 53a.

[24] Appendix A, *Dotson v. Wilkinson*, at p. 6a.

– and bogus – felony conviction to ratchet upward the Risk Score.[25] Another panel transformed seven misdemeanors into two felonies for the same purpose.[26] Another panel embraced bogus juvenile convictions, ignoring a certified record proving these convictions did not exist.[27] Suitability criteria transforms into an indistinguishable blend of fiction and fact.

Rogerico Johnson has a common last name. Inmate files often contain records belonging to prisoners sharing the last name. Donald Hall had records reflecting one prior conviction and a prior arrest.[28] Municipal Court Judge Thomas Gysegem informed the Parole Board of two Donald Halls in Trumbull County. Judge Gysegem recites both social security numbers to prove that the Donald Hall with institution number A265679 was not convicted for a bad check or arrested for an assault charge in 1991.[29] Despite this evidence, these records remained in the inmate's file.

[25] *See Michael v. Ghee*, Document No. 205, Plaintiffs' Exhibit 99 A, Affidavit of Ricky Williams. [After creating a bogus felony conviction, the panel marked out a correct risk score and inserted an inflated score.]

[26] *See Michael v. Ghee*, Document No. 208, Plaintiffs' Exhibit 131, Affidavit of Shauntain White. [Three prior adult or juvenile felonies dictate an upward departure. Misdemeanors are not to be counted.]

[27] *See Michael v. Ghee*, Document No. 204, Plaintiffs' Exhibit 71, Affidavit of Damon Harp. [His Risk Score was raised because of juvenile offenses, of which he had none.]

[28] *See Michael v. Ghee*, Document No. 1, Original Complaint, at Paragraph 311.

[29] *See Michael v. Ghee*, Document No. 1, Plaintiff Exhibit 103 [Letter of Judge Gysegem, Sept. 20, 2000.]

Parole Board panels focus predominantly upon the crime and disciplinary record. Using crimes for which Johnson has never been charged and prison conduct reports which do not exist – at least as to him – strains credibility for justifying *ten days*, let alone *ten years*. It is patently arbitrary to rely upon records lacking any factual basis.

Johnson's Due Process Claim

In District Court, Johnson claimed his due process rights were violated because he did not receive a *meaningful* hearing. Like Dotson, Johnson is asking for a new procedure *in the future*. This form of relief cannot be granted under the restrictive habeas statute.

Securing a meaningful parole hearing with a result that is not arbitrary is no small matter to an Ohio inmate. The Parole Board has given itself the authority to issue a continuance for as long as ten years – one more indicia of autonomy – and this *follows* the time *already served* for the trial court.[30] While conducting our survey, we discovered that five to ten year continuances are not just common; they are often *necessary* to bridge differences between the trial court's minimum sentence and the assigned guideline range. Given the long span of time between parole reviews, there is a colorable claim qualifying a *meaningful hearing* as a protectible liberty interest under the Due Process Clause.

[30] *See* Department of Rehabilitation and Correction Policy No. 501-67 and Ohio Adult Parole Authority Extended Continuance Policy. These Policy Statements were never approved by Ohio's legislature.

ARGUMENT III – ABUSE OF THE TERMINATION REQUIREMENT

The second question asks whether ordering a new parole review necessarily invalidates the prior hearing. If ratified, the *favorable termination requirement* would further buttress Parole Board autonomy. No inmate challenge could evade this net, for every review engages and threatens a prior finding. This precedent would transform *Heck* into a Halt sign, disqualifying any inmate challenge from § 1983 consideration.

Parole Decisions do not Equate to Judicial Decisions

At first reviews, nine out of ten Ohio hearings are clerical exercises. Inmates receive two scores; (1) convictions *should* dictate the offense score, and (2) their prior criminal history tabulates a risk score. These scores consign an inmate to a guideline. If the candidate has not penetrated the range required for their crime, the guideline placement requires a perfunctory continuance. In Dotson's case, his *second* hearing will be a perfunctory denial. *Discretion is never exercised*. Parole decisions are not equivalent to judicial decrees.

As employed by Ohio's Attorney General, the *favorable termination requirement* of *Heck* has been transformed into a robotic claim dismissal machine, capable of labeling all parole related claims legally frivolous at the starting gate, notwithstanding evidence suggesting meritorious issues. Dotson's and Johnson's claims attest to this phenomenon.[31] The simplicity of this clause is also its curse. In

[31] *Wilkinson v. Dotson*, Appendix C at p. 50a and 51a, Appendix D at p. 55a and 56a.

a parole context, *Heck's* standard is impossible to satisfy. The *favorable termination requirement* could effectively entrench Parole Board autonomy, nourishing audacity and further exacerbating ungovernability.

ARGUMENT IV – PAROLE IS NOT *PRISON ADMINISTRATION*

Parole officials possess remedial sentencing authority. Judges possess punitive sentencing authority. In Ohio, where the statutory scheme for a first degree crime is 5 to 25 years, this boundary has been crossed. When parole officials exceed their authority, the intrusion vitiates trial court orders. *Layne* has been emasculated and trivialized by Ohio's Parole Board bureaucracy to the point of rendering it ineffectual. Conduct contemptuous of judicial authority must not be condoned because prison officials have labeled the challenged activity *prison administration*.

Wiggling around *Layne's* Command

Michael v. Ghee has tracked Ohio's Parole Board for three years. The creature in the cross hairs of our scope has impressed us. A more insular and intractable foe cannot be fathomed. Petitioners' statement that myriad § 1983 claims were ultimately resolved on state law grounds by Ohio's Supreme Court is not true.[32] We take pleasure in describing how far wide of the mark this statement falls. Imagine the Parole Board circling *Layne*

[32] Brief for Petitioners, at p. 47.

under our microscope glass. For the squeamish, beware. This dissection is not pretty.

Layne's holding and its use of the words *must assign* produces a straightforward, unambiguous order. The message registered. In an affidavit, the Parole Board stated:

> "The OPB stopped the practice of classifying offenders' offense behavior under the Parole Guidelines based on anything other than their offenses of conviction at approximately noon on December 18, 2002. It has not resumed that practice and has no plans to do so. The offense behaviors of all inmates evaluated under the Parole Guidelines since December 18, 2002 has corresponded to the offense or offenses of conviction, regardless of whether they are incarcerated pursuant to a plea agreement or a trial. That will also be true of all inmates classified under the Parole guidelines in the future.
>
> "The OPB will rehear all inmates whose offense behavior was previously classified under the Parole Guidelines as something other than their offenses of conviction. Those rehearings will occur regardless of whether the inmate is incarcerated pursuant to plea bargains or trials and will result in those inmates' offense behavior being classified based on their offenses of conviction."[33]

On the strength of this affidavit, several *Michael v. Ghee* claims were declared moot.

[33] *See Michael v. Ghee*, Document No. 135, Defendants' Motion to Dismiss for Mootness, Exhibit A, 3rd Affidavit of Richard Spence. [Mr. Spence is Chief of Quality Assurance for the Ohio Parole Board.]

Paring 3,218 Inmates from *Layne* Reviews in 34 Days

As a rule, Parole Board's are secretive government agencies. Ohio is no exception. In a sharp departure from customary practice, the website of a newspaper was enlisted for publishing the names of inmates qualifying for a *Layne* review. This occurred on April 27, 2003. 5,316 inmates were listed.[34] Inexplicably, the newspaper's website carried a second list of qualifying inmates on May 31, 2003 numbering 2,098.[35] In an accompanying article, no explanation was given for paring down the number of qualifying inmates from 5,316 to 2,098 in just 34 days. Between April 27th and May 31st, wiggle room was discovered.

Douglas Ankrom qualified for a *Layne* review on the 1st and 2nd list.[36] He was convicted of first degree murder. Category 11 matches his conviction. Question 1 of the Parole Board Decision form records the offense behavior score.[37] Instead of Category 11, Category 13 appears, referring to aggravated murder. Ankrom's trial court

[34] *See Michael v. Ghee,* Document No. 197, Plaintiffs' First Ohio Adult Parole Authority Layne Review List, published on the Cleveland Plain Dealer website 4/27/2003.

[35] *See Michael v. Ghee,* Document No. 198, Plaintiffs' Second Ohio Adult Parole Authority Layne Review List, published on Cleveland Plain Dealer website 5/31/2003.

[36] *See Michael v. Ghee,* Document No. 199, Plaintiffs' Exhibit 1-A, Affidavit of Douglas Ankrom, corroborated by a certified copy of judgment entry, his Parole Board decision prior to *Layne* where he was placed in Category 13 for Aggravated Murder, and his post-*Layne* decision dated May 16, 2003.

[37] *See* Amici Brief for Respondents, Appendix I, at p. 1 – Question 1.

judgment is never acknowledged. Reflective of autonomy and ungovernability, this occurred in 2,098 cases.

Moses Clark appears on the first *Layne* list.[38] His name is missing from the 2nd *Layne* list. Mr. Clark's conviction engages category 10. The Parole Board agrees.[39] A score of 10 appears in Question 1. Question 8 on the parole decision form prior to *Layne* provided space for an upward departure.[40] For Question 8, his panel determined that he is a "more serious risk than indicated by his criminal history risk score." Instead of getting a higher *risk score*, Clark's panel made a one range *offense departure*. Engaging category 11 conflicts with his conviction and adds five years – as compared to 2½ years for a risk score departure – before qualifying for parole. In defending this decision, the Parole Board stated:

> "Our office has reviewed your file per the above noted request and determined that the ruling (i.e. *Layne*) does not apply to your case. The Parole Board did assign the offense category that corresponds with your offense(s) of conviction. Therefore, the continuance rendered to you by

[38] *See Michael v. Ghee,* Document No. 208, Plaintiffs' Exhibit 130, Affidavit of Moses Clark [corroborated by certified court judgment, his 2001 parole decision and two letters seeking a *Layne* review. Mr. Clark appears on page 15 of the first alphabetical *Layne* List. His risk score is 1. A departure would move him horizontally one range.]

[39] *See* Letter from E.M. Colan, corroborating facts in Mr. Moses affidavit.

[40] *See* Amici Brief for Respondents, Appendix I, at Question 8.

the Parole Board stands and no further action will be taken at this time."[41]

We have 28 identical letters.[42] One factor separates 2,098 inmates on the 2nd *Layne* list from 3,218 inmates omitted. This common denominator is *the location of an upward departure*. If the departure appears in Question 1, a review is needed *to add the score matching the conviction*. If this departure occurs on Question 8, Question 1 reflects the trial court score. No review is needed. Like Clark, 3,218 inmates are serving time *required* by an offense score higher than their crime. The Parole Board considers this detail immaterial.

Layne Frustrated and Circumvented

Via this bureaucratically inspired revelation, *Layne* has been reduced to a clerical entry. Ohio's Supreme Court has no interest in a hearing's result. *Layne* is only concerned with *the appearance of the record*. Question 1 needs a certain number, just as Question 4 needs a number tallying the months served. No further significance attaches to either entry.

[41] *See Michael v. Ghee*, Document No. 208, Plaintiffs' Exhibit 130, Affidavit of Moses Clark, letter from Case Analyst Eric Griffith, dated July 28, 2003.

[42] *See Michael v. Ghee*, Document No. 210, Plaintiffs' Exhibit 148, 22 Form letters from Parole Board Chairman Gary Croft and 6 Form letters from Parole Board Case Analyst Eric Griffith.

Layne's last sentence[43] has been separated from its context[44] and given a literal interpretation. In lieu of upward departures, months are added for *aggravating factors*.[45] By adding time for reasons purportedly grounded in *Layne*, the Parole Board circuitously acquires a license to do precisely what *Layne* prohibited. For second and later reviews post-*Layne*, the matrix grid has been disemboweled because guideline boundaries no longer function as benchmarks for time-served. Charging, convicting and sentencing an inmate for new criminal behavior, the practice outlawed by *Layne*, continues under a new form of *ultra vires* authority – simulating the sentencing hearing conducted by a Judge. Administrators are adding years for *aggravating factors* or *any other factors the APA deems relevant* for behavior springing from the original crime and already considered by the trial court. In the process, the settled expectation of an inmate that they have been fully punished for their crime is totally undermined. The measure of determination displayed by parole officials to preserve discretion, even at the cost of outrageously assaulting and usurping judicial authority, is shocking and dangerous. More potent evidence of Parole Board autonomy and ungovernability would be hard to find.

[43] 97 Ohio St. 3d at 464. "We further emphasize . . . that the APA, when considering an inmate for parole, still retains its discretion to consider any circumstances relating to the offense or offenses of conviction, including crimes that did not result in conviction, as well as any other factors the APA deems relevant."

[44] Two authorities follow, *Hemphill v. Ohio Adult Parole Authority*, 61 Ohio St. 3d 385, 386 (Ohio 1991) and Administrative Rule 5120:1-1-07. These authorities allow consideration of acquitted conduct along with other factors in determining *where* an inmate is to be placed *within* their proper guideline range.

[45] *See* Amici Brief for Respondents, Appendix II, at p. 2, Questions 8 and 9. *Compare* to Questions 8 and 9 in Amici Brief for Respondents, Appendix I.

ARGUMENT V –
DUE PROCESS AND MEANINGFUL HEARING

Dotson's case illustrates how Ohio's Parole Board plunged headlong into the sentencing business. Johnson's case documents how parole panels make a mockery out of a single court judgment. Taken together, we have a composite portrait of how parole administrators usurp authority from judges. Undisputed facts are sufficiently atrocious to warrant a finding not contemplated when certiorari was granted. The procedural safeguards in *Wolff*[46] need to be extended to parole hearings. These protections, specifically the maintenance of a record at the hearing and producing a written and reasoned decision grounded in evidence developed from the hearing, will hold parole decision-makers accountable and render their decisions suitable for judicial review. Most importantly, the primacy of judicial authority will be restored. While parole is not a protected liberty interest, a *meaningful hearing* needs to become a protected liberty interest because parole panels are administering punitive and illegal modifications to a trial court's lawful sentence in an *ultra vires* manner.

Parole Guidelines Never Approved by Legislature

In 1961, certiorari was granted to review an Ohio statute making the mere possession or control of obscene material a felony.[47] When facts were fully revealed, the

[46] 418 U.S. 539, at 563-570 (1974).

[47] *Mapp v. Ohio*, 367 U.S. 643, at 673 (1961) [Dissent of Justice Harlan].

seizure of this material turned out to be so appalling,[48] this Court abandoned the certified question and produced its landmark decision *Mapp v. Ohio*.[49] We are not suggesting abandonment of the certified question. We are asking this Court to address the *ultra vires* acts of parole administrators and check the resulting usurpation of judicial authority.

Ohio's parole guidelines were never approved by the legislature and do not appear in Ohio's administrative code.[50] Mr. Wilkinson, as Director of an Ohio Department, used a general grant of delegated authority to implement these rules. In so doing, the penological philosophy sanctioning Ohio's indefinite sentencing scheme has been totally sabotaged.

There is nothing in Ohio's Revised Code favoring the maximum sentence over the minimum sentence. The minimum sentence rendered by a judge stands equivalent to the maximum sentence issued by operation of law. Both sentences should maintain their respective magnetic properties. The minimum sentence is there to reward offenders desiring to conform. The maximum sentence is there for inmates unwilling to address antisocial behavior. This equilibrium has been destroyed by these new parole guidelines. Once the hollow bureaucratic exercise masquerading as the first parole review is done, the trial court

[48] *Mapp v. Ohio*, 367 U.S. at 644.

[49] 367 U.S. 643 (1961).

[50] *See* Ohio R.C. § 111.15(D)(1) and (4) [provision for review and approval by the General Assembly's Joint Committee on Agency Rule Review for new executive rules]. *See also* Ohio R.C. § 119.03(H)(1), (2)(a), (b) [prerequisites not met for inclusion in Ohio's Administrative Code.]

minimum sentence is rendered a nullity. Even first time offenders and model inmates must step off time to their maximum sentence with no relief in sight.

The Thorough Pre-Hearing Review

Petitioners describe parole officials as conducting a thorough pre-hearing review of the inmate's prison and parole file.[51] We disagree. An inmate's Master File (i.e. court file) and Unit File (i.e. institution file) can be up to eight inches thick. These files must never leave the prison. The pre-hearing review begins when the Central Office generates a list of parole candidates called Panel Assignments.[52] 20 to 30 inmates are typically listed on a panel.[53] One Parole Board Member and one Hearing Officer are assigned to a panel *on the day of the hearing*. The first time all of the files and all of the decision-makers converge is on the day of the hearing.[54] Before this time, neither a

[51] Brief for Petititoners, at p. 7.

[52] *See Michael v. Ghee,* Document No. 63, Plaintiffs' Ohio State Highway Patrol Investigation of Parole Board Hearing Officer Harold Miller, Testimony of Thomas C. Schneider, Executive Assistant to the Chairperson on April 6, 1998 at p. 3. [Mr. Schneider generated the initial panel assignments.]

[53] *See Michael v. Ghee,* Document No. 62, Volume I, Plaintiff Exhibit 8, Memos from Liann Bower, Record Supervisor at Northeast Pre-Release Center in Cleveland to Unit Managers, regarding Parole Board Hearings August 2 & 3, 2001, dated July 25, 2001 and September 5 & 6, dated August 3, 2001.

[54] *See Michael v. Ghee,* Document No. 63, Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998 at p. 32. ["When they go to the institution that day, that's you know, the call sheet . . . that's when they'll find out where they're going, who they're working with and what inmates they're going to hear. It's not that they couldn't pull up a call sheet or have a call sheet pulled up ahead of time to see who's on a certain panel, they could do that, but in my mind there'd be no reason

(Continued on following page)

Parole Board Member nor a Hearing Officer knows for sure which cases they will be hearing that day.[55]

Decisions will be rendered on every candidate *that day*. If there are twenty-six inmates on a panel, the stack is divided evenly between the Hearing Officer and Parole Board Member. Each decision-maker taking a file becomes the *primary* for that case.[56] Only the *primary* decision-maker becomes acquainted with each file.[57] The *primary* decision-maker conducts their hearing while the other decision-maker prepares for the next case.[58] Two decision-makers initial each decision.[59] If cases are continued, the

for them too. Because who cares who you see. You know what I mean, who's on your panel is who you see, you got to get the job done."]

[55] *See Michael v. Ghee,* Document No. 63, Testimony of Parole Board Member Constance Upper on April 7, 1998 at p. 2-3. *See also* Testimony of Hearing Officer Ronald Stevenson on April 22, 1998 at p. 3; Testimony of Hearing Officer Michael Keith on April 7, 1998 at p. 3; Testimony of Hearing Officer Kathy Hilbert on April 22, 1998 at p. 5.

[56] *See Michael v. Ghee,* Document No. 63, Testimony of Hearing Officer Kathy Hilbert, April 22, 1998 at p. 10. *See also* Document No. 63, Testimony of Hearing Officer Ronald Stevenson, April 22, 1998 at p. 21.

[57] *See Michael v. Ghee,* Document No. 63, Testimony of Parole Board Member Constance Upper, April 7, 1998, at p. 7; Document No. 63, Testimony of Hearing Officer Ronald Stevenson, April 22, 1998, at p. 25.

[58] *See Michael v. Ghee,* Document No. 63, Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998, pp. 4, 9. *See also* Document No. 199, Plaintiffs' Exhibit 4-B, Affidavit of Brad Lee Baeder [One panel member conducts the hearing. The other person looks at unrelated records].

[59] *See Michael v. Ghee,* Document No. 63, Testimony of Hearing Officer Ronald Stevenson, April 22, 1998 at p. 20; *See also* Document No. 63, Testimony of Parole Board Member Constance Uppers on April 7, 1998 on p. 7. [The non-primary decision-maker gives the file only a cursory review, if that.]

non-primary decision-maker initials in rapid succession.[60] The size of these files and the lack of opportunity to review files till the day of the hearing, coupled with pressure to generate twenty to thirty decisions in a day, has a predictable and demeaning consequence.[61] The decision form[62] and information to be verified in a computer[63] become more important than the candidate. This helter-skelter process victimizes more than just inmates. Trial court decisions and criminal justice are also mortally wounded.

Wrecking Carnage upon Ohio Judicial Decisions

Inmate cases in *Layne* document destruction to court judgments. Wiley Layne was convicted of abduction. For this crime and his criminal history, a guideline of 5 to 7 years applied. The Parole Board found him guilty of kidnapping and applied a guideline of 12.5 to 17.5 years.[64]

[60] *See Michael v. Ghee*, Document No. 63, Testimony of Parole Board Member Larry Matthews on April 6, 1998, p. 9. *See also* Document No. 63, Testimony of Parole Board Member Constance Upper on April 7, 1998, p. 7; Document No. 63, Testimony of Hearing Officer Ronald Stevenson on April 22, 1998, p. 6, 7.

[61] *See Michael v. Ghee*, Document No. 62, Volume I, Plaintiff Exhibit 11, Affidavit of Douglas Lawson [his hearing lasted five to eight minutes and the hearing officer was rushed, hurried and rude.] *See also Michael v. Ghee*, Document No. 204, Plaintiff Exhibit 72, Affidavit of Sheila Rutkowski [Parole Board Member Denton told her she had 10 minutes so she had better hurry up.]

[62] *See Michael v. Ghee*, Document No. 199, Plaintiffs' Exhibit A-2, Affidavit of Doug Ankrom [decision written before he entered the room].

[63] *See Michael v. Ghee*, Document No. 199, Plaintiffs' Exhibit 12-A. Affidavit of Robert Budd [Hearing's purpose was to verify data in the computer. Unit and Master Files were available but never consulted.]

[64] *See Layne*, 97 Ohio St. 3d at 458-459. [Mr. Layne's complaint was dismissed as legally frivolous.]

Gerald Houston pled guilty to one count of aggravated burglary, three counts of aggravated robbery and two counts of attempted murder. Mr. Houston's crimes required 10 to 15 years.[65] The Parole Board gave him a two range upward departure, finding him guilty of attempted rape. Houston was never charged with attempted rape.[66] His departure required 20 to 25 years. Howard Lee was convicted of involuntary manslaughter.[67] He received 3 years for a firearm violation and 9 to 25 years for his crime. His parole panel found him guilty of aggravated murder and placed him in Category 13,[68] a guideline requiring at least 30 years. Lee would never become eligible for parole. His maximum sentence expired two years before his guideline began.

In fifteen file cabinets of client documentation, we can produce thousands of similar horror stories. Reigning-in parole decision-makers has just become even more pressing, given the current reading of the Sixth Amendment announced in *Blakely v. Washington*.[69]

Exclusion of Ohio's Judiciary from Parole Decisions

From a Separation of Powers perspective, Federal and Ohio parole guidelines are polar distances apart. At a federal sentencing hearing, the trial judge presides and

[65] *See Layne*, 97 Ohio St. 3d at 460.

[66] *See Layne*, 97 Ohio St. 3d at 460. [Mr. Houston's complaint was dismissed as legally frivolous.]

[67] *See Layne*, 97 Ohio St. 3d at 461. [Only Lee's complaint survived a Motion to Dismiss.]

[68] *See Layne*, 97 Ohio St. 3d at 461.

[69] 72 U.S.L.W. 4546 (2004).

applies guidelines *before* the Defendant begins their sentence. Guidelines are applied consistent with the conviction. A court reporter is present to generate a transcript. If a federal inmate is unhappy with a sentencing decision, they can appeal to a Federal appellate court.

In Ohio, guidelines are applied after the minimum sentence, minus good time, has been served. The hearing is conducted in prison by an administrator.[70] There is no hearing transcript.[71] Only the inmate and decision-makers may be present.[72] Parole panels have authority to depart from court judgments, acting as prosecutor, judge and jury. At a hearing's conclusion, an inmate can be found guilty of a crime never sanctioned by a judge or proven in court. For second and later parole reviews, years can be added for aggravating factors previously considered at a sentencing hearing and factored into the minimum sentence. Ohio inmates have no appellate rights regarding how guidelines have been applied. Inmates can only appeal to a Quality Assurance Group composed of the same administrators making these decisions initially.[73]

[70] *See* Brief for Petitioners, Supplement at S-10, ODRC Policy 501-36, Parole Board Hearing Policy, IV Definitions, Paragraph J. [omitted from excerpt provided by Petitioner].

[71] *See* Brief for Petitioners, Supplement at S-12, ODRC Policy 501-36, Parole Board Hearing Policy, VI Procedure, Paragraph C(2) and S-14, Paragraph C(8).

[72] *See* Brief for Petitioners, Supplement at S-12, ODRC Policy 501-36, titled Parole Board Hearing Policy, VI Procedure, Paragraph C(2).

[73] *See* Brief for Petitioners, Supplement at S-17, ODRC Policy 501-38. Petitioners' statement that inmates have two court avenues for contesting parole decisions is not accurate. (Brief for Petitioner at pp. 10-11). Policy No. 501-38 provides an inmate with no court avenues. The options mentioned, Declaratory Judgment and Mandamus, are

(Continued on following page)

Parole Hearing a Protected Liberty Interest

The total collapse of *due process* at Johnson's hearing, compounded by a ten year continuance, casts an ominous shadow over this record just as the seizure of evidence haunted *Mapp*. Johnson raised this issue at his trial court. This Court has authority to consider such questions *de novo*. Ohio's Supreme Court has construed the term *eligible for parole* in former R.C. § 2967.13(A) as requiring a meaningful parole hearing.[74] In a state trial court decision consolidating 24 cases and certified as a class action, a Common Pleas Judge in Franklin County (i.e. Columbus) just held that Ohio inmates are entitled by contract *and by statute* to meaningful parole consideration.[75] There is no legal or constitutional authority giving administrators the right to overrule judges.

Confidence in criminal jurisprudence has been imperiled by *ultra vires* acts of parole administrators. We understand that Ohio inmates have no vested right to parole.[76] However, since *Sandin v. Conner*[77] overruled much of the reasoning in *Hewitt v. Helms*,[78] and *mandatory language* in a statute or rule has been replaced by a new standard

both illusory. Lack of a record from a parole hearing renders the Declaratory Judgment route hollow. Parole Board discretion totally nullifies the Mandamus cause of action.

[74] *See Layne*, 97 Ohio St. 3d 456, 463-464 (Ohio 2002). "Inherent in the statutory language is the expectation that a criminal offender will receive meaningful consideration for parole."

[75] *See Ankrom v. Harry Hageman*, Case #01CVH02-1563, slip opinion at p.13 attached hereto as Appendix III.

[76] *See Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979).

[77] 515 U.S. 472 (1995).

[78] 459 U.S. 460 (1983).

inquiring as to whether restraints upon freedom impose *an atypical and significant hardship*, an opening has been created for considering a second issue related to parole within the context of the Due Process Clause. Given the prosecutorial bend of Ohio's Parole Board and their authority and proclivity to depart from trial court judgments, we believe inmates deserve and need a protected liberty interest in a *meaningful parole hearing*, if judicial primacy is to be maintained.

CONCLUSION

For the foregoing reasons, as well as arguments in Respondents respective merit briefs, the Sixth Circuit's decision should be affirmed.

Respectfully submitted,

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Ohio Parole Board Decision

Name:	Inmate No.:	Date:
Hearing Type:	Security Level:	Sentence:	(MAX/EDS/EST. (circle one)

1. The (offense) (parole violation) behavior has been rated as Category _____ because the offense behavior involved (Circle appropriate behavior):

_____

_____

_____

_____

_____

_____

Section No.(s):

_____

2. The Criminal History/Risk Score is _____ .
3. The Guideline Range is _____ months.
4. Time served _____ mos + JTC _____ mos = Total Time Served _____ mos. TPV Arrest Date: _____
5. Check if non -applicable ☐ . The inmate has committed new felony criminal conduct in a prison facility that is rated as Category _____ because it involved: _____

_____

_____

Section No.(s):

_____

The Rescission Criminal History/Risk Score is _____ .

This conduct requires _____ months to be added to the guideline range.

6. Check if non-applicable ☐
   A. The inmate has committed _____ disciplinary infractions involving non-felonious threatening conduct against staff and/or non-felonious possession of a dangerous instrument (6-12 months per infraction to be added to the guideline range) that occurred on the following dates:

   _____

   B. The inmate has committed _____ disciplinary infractions involving possession or use of alcohol and/or possession or use of a controlled substance other than possession of a controlled substance with intent to distribute (3-6 months per infraction to be added to the guideline range) that occurred on the following dates:

   _____

   C. The inmate has committed _____ disciplinary infraction involving other misdemeanor conduct (0-6 months per infraction to be added to the guideline range) that occurred on the following dates:

   _____

   D. The inmate has committed _____ other significant disciplinary infractions (0-2 months per infraction to be added to the guideline range) that occurred on the following dates:

   _____

   This conduct requires _____ months to be added to the guideline range.

DEFENDANT'S EXHIBIT
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Name:	Inmate No.:	Date:

7. Check if non -applicable ☐ . The aggregate guideline range is _____ months.

8. After review of all relevant factors and information presented:

☐ A. A decision outside the guidelines at this consideration is not warranted. Therefore, the Board's decision is within the applicable guideline range.

☐ B. Rescission guidelines were used to address rescission behavior since the last time setting hearing, and the aggregate guideline range is exceeded.

☐ C. A decision (Above/Higher) (Below/Lower) the guidelines is warranted because:
- ☐ (1) The inmate's offense behavior involved the following specific (aggravating) (mitigating) factors:
- ☐ (2) The inmate is a (poorer) (more serious) (better) risk than indicated by his/her criminal history score for the following specific reasons:
- ☐ (3) Other specific reasons:

List number of guideline ranges departed: Vertical _____ Horizontal _____

List selected guideline range: _____ months.

2a

_____

_____

_____

_____

_____

_____

_____

_____

_____

9. Total time to be served _____ months.

10. Optional Outstanding Program Achievement ☐ granted ☐ not granted.
(Note: The granting or denying of such credit is discretionary.)

The Board's decision includes a _____ month credit for outstanding program achievement as specified below:

_____

_____

11. Adjusted total time to be served _____ months.

12. Recommendation: _____

_____

13. Institutional conditions prior to PRD or next hearing: _____

_____

DEFENDANT'S EXHIBIT
10 P-2
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14. Hearing Panel:

Board Member:	Hearing Officer:

Release on PRD is contingent on good institution behavior and/or reduction from maximum security status.
A PRD may be extended for a Class II violation when the case is reviewed at the PRD Pre-Release Review.

DRC 3331 (7/99) DISTRIBUTION: WHITE - Parole Board CANARY - Inmate PINK - Research GOLDENROD - Record Office

Criminal History / Risk Score

Inmate Name:	Institution#:
Date of Birth:	

Select the appropriate answer to each item and enter the associated weight in the corresponding box

Risk Item	Weight	Score
Item A. Prior Convictions/Adjudications (Adult or Juvenile)		
NONE	0	
1 - 2	1	
3 OR MORE	2	
Item B. Prior Commitments of More Than One Year (Adult or Juvenile)		
NONE	0	
1	1	
2	2	
3 OR MORE	3	
Item C. Recent Commitment Free Period (Three Years)		
No prior commitment of 60 days or more (adult or juvenile) or released to the community from last such commitment at least 3 year prior to the commencement of the current offense	0	
Released to the community from a commitment of 60 days or more (adult or juvenile) Less than 3 years prior to the commencement of the current offense	1	
Item D. Probation/Parole/Confinement/Escape status violator this time		
Neither on probation, parole, confinement, or escape status at the time of the current offense; nor committed as a probation, parole, confinement, or escape status violator this time	0	
On probation, parole, confinement, or escape status at the time of the current offense; Or committed as a probation, parole, confinement, or escape status violator this time	1	
Item E. Prior Probation/Parole Revocations		
No prior probation or parole revocation	0	
One or more prior probation or parole revocations	1	
Item F. Older Offenders		
If age 40 or older at the commencement of the current offense (and the total score from Items A-E above is 1 or more) Subtract	1	
Otherwise	0	
TOTAL SCORE		

Completed By (Signature):	Date:

DRC 3153 (Rev. 2/99) DISTRIBUTION: WHITE - Board File CANARY - Inmate PINK - **RESEARCH**

DNCAD-Bayonne, N. J.

DEFENDANT'S EXHIBIT 8

Ohio Parole Board Decision Sheet

Inmate Last Name:	Inmate First Name:	# Prefix:	Inmate Number:

Current Hearing Identifier:

Hearing Month (mm/yyyy):	Type of Hearing:	Record Number:	Date of Hearing:

Offense(s) of Conviction:

---

1. **Category** __ for the conviction
   A. Guideline Section No.(s):
   B. Details of the conviction behavior. Only state the facts that support the specific offense category, which corresponds to the offense(s) of conviction:

---

2. **Criminal History/Risk Score:** 3. **The guideline range is** ____ months.

---

4. **Total Time Served:**
   TPV Arrest Date:

---

5. ____ infractions that resulted in a new conviction for felony criminal conduct committed in a prison facility/or while in custody. Only state the facts that support the specific offense category, which corresponds to the offense(s) of conviction.

Category for New Conviction:	Section No.(s):	Criminal History/Risk Score:	Guideline Range:

Details of Conviction Behavior:

---

6. **Class II Rescission Behavior Guideline Range is** ____ months.

A. __ disciplinary infractions involving felonious conduct

1. 6-18 months for each infraction	2. = months

Details:

B. __ disciplinary infractions involving threatening conduct against · taff and/or possession of a dangerous instrument

1. 6-12 months for each infraction	2. = months

Details:

C. __ disciplinary infractions involving possession or use of alcohol and/or a controlled substance other than possession with intent to distribute

1. 3-6 months for each infraction	2. = months

Details:

Inmate Last Name:	Inmate First Name:	# Prefix:	Inmate Number:	Institution:

D. __ disciplinary infractions involving other misdemeanor conduct

1. 0-6 months for each infraction	2. = months

Details:

E. __ significant disciplinary infractions

1. 0-2 months for each infraction	2. = months

Details:

7. **Aggregate Guideline Range is:** ____ months (#3 + #5 + #6)

8. **Rationale of decision within Aggregate Guideline Range:**

9. A. **Circumstances related to the offense(s) of conviction, including crimes that did not result in conviction, and any other factors the APA deems relevant:**

B. **Based on these additional factors, an additional ___ months should be served from the date of this hearing before release/next hearing.**

10. A. **Total Time to be Served:** To next hearing ☐ ___ months
To Release ☐ ___ months

B. **Remaining Time to be Served:** To next hearing ☐ ___ months
To Release ☐ ___ months

11. A. **Outstanding Program Achievement** ☐ granted ☐ not granted
B. __ month credit for the following programs:
C. Adjusted Total Time to be Served: months
D. Adjusted Remaining Time to be Served: months

12. **Recommendation:**

13. **Instructions/Notes:**

14. **Hearing Panel**

Board Member Signature:	Hearing Officer Signature (if applicable):
Board Member:	Hearing Officer (if applicable):

Release on PRD is contingent on good institution behavior and/or reduction from maximum security status. A PRD may be extended for a Class II violation when the case is reviewed at the PRD Pre-Release Review.

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

Douglas Ankrom, et al.,	(Filed 2004 August 31)
Plaintiff,	Case No. 01CVH02-1563
vs.	Judge Cain
Harry Hageman, et al.,	
Defendants	
Don Carlos Scott,	
Plaintiff,	
vs.	Case No. 00CVH04-315
The Ohio State Adult Parole Authority,	Judge Brunner
Defendant.	
Rufus N. Watkins,	
Plaintiff,	
vs.	Case No. 00CVH06-5425
The Ohio State Adult Parole Authority,	Judge Hogan
Defendant.	
Terrance Davis,	
Plaintiff,	
vs.	Case No. 00CVH07-6781
The Ohio State Adult Parole Authority,	Judge Miller
Defendant.	

Michael C. Poluka, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 00CVH08-7676 Judge Miller
John R. Adams, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 00CVH12-10731 Judge Connor
Yohance A. Edmonds, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 01CVH01-148 Judge Connor
Gerald L. Raines, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 01CVH01-835 Judge Brunner

Matthew Biddle, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 01CVH03-2206 Judge Cain
Tysen Porter, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 01CVH05-4246 Judge Brunner
Donald A. Harman, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 01CVH05-4713 Judge Brunner
David A. Cunningham, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 01CVH06-5338 Judge Brunner

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

Douglas Ankrom, et al., Plaintiff, vs. Harry Hageman, et al., Defendants	:	Case No. 01CVH02-1563 Judge Cain
Don Carlos Scott, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 00CVH04-315 Judge Brunner
Rufus N. Watkins, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 00CVH06-5425 Judge Hogan
Terrance Davis, Plaintiff, vs. The Ohio State Adult Parole Authority, Defendant.	:	Case No. 00CVH07-6781 Judge Miller

DECISION AND ENTRY

This matter came before the court on motions for summary judgment filed by both the plaintiffs and the defendants. Both sides have filed memoranda contra and replies to the memoranda contra.

Extensive negotiations have been conducted by the parties and the defendants have held re-hearings for the more than 2,400 class members in this case after the Ohio Supreme Court released its opinion in *Layne v. Ohio Adult Parole Authority*, 97 Ohio St. 3d 456. However, the parties have not been able to resolve all the issues in the instant litigation and it is now ripe for a decision on the motions.

The factual background is not in dispute. The plaintiffs in this class action are inmates in the custody of the Ohio Department of Rehabilitation and Corrections (ODRC) serving indeterminate sentences under the "old law", i.e. the criminal sentencing laws that were in effect before S.B. 2 became effective on July 1, 1996, and eliminated indeterminate sentences for all but the most serious offenses. The Ohio General Assembly refused to make the new laws retroactive – apparently for no reason other than political expediency – and thereby created two classes of inmates serving different amounts of time for the same offenses. The "new" criminals serve exact sentences as imposed by the sentencing judges. But the release dates for the "old" criminals are still determined by the Ohio Adult Parole Authority (OAPA).

Most of the class members in this litigation were complaining that they were convicted of or entered a guilty plea or no contest plea to lesser and fewer crimes

than indicted but were assigned offense categories by the OAPA that did not correspond to their offenses of conviction. During the pendency of this action, the Ohio Supreme Court issued a decision (in December, 2002) in *Layne v. Ohio Adult Parole Authority*, 97 Ohio St. 3d 456, and held that "in any parole determination involving indeterminate sentencing, the OAPA must assign an inmate the offense category score that corresponds to the offense or offenses of conviction."

Since that time, the OAPA has conducted new parole hearings for about 2500 inmates who came within the *Layne* purview and more than half of them have now been released.

Thus, the claims of numerous class members are now moot. However, other claims remain and should be resolved in accordance with the language the Supreme Court employed in *Layne*. The complaints revolve around the Ohio Parole Board Guidelines that the OAPA issued on March 1, 1998.

The plaintiffs complain that by issuing the new guidelines the OAPA engaged in rulemaking but did not promulgate the new rules in accordance with the Administrative Procedure Act. They also argue that the OAPA's guidelines and practices violate the doctrine of separation of powers, violate the contracts they entered as a result of plea negotiation, violate constitutional guarantees of due process and equal protection, and violate constitutional prohibitions against double jeopardy and ex post facto enhancement of punishment.

As to the rulemaking challenges, the defense points out that the Tenth District Court of Appeals (Franklin County) held in *Poluka v. Adult Parole Authority*, 2003

Ohio 153, that parole guidelines are not administrative rules and need not be promulgated in accordance with the Administrative Procedures Act (APA). The plaintiffs argue that the *Poluka* case should not be followed because it relied on *Mayrides v. Ohio Adult Parole Authority*, 1998 Ohio App. LEXIS 1865. *Mayrides* involved a one-page matrix formerly used by the OAPA as opposed to the 93-pages of detailed guidelines that are involved in the current dispute. However, a reading of those cases shows that they did not turn on the length or complexity of the guidelines but simply on the principle, as stated in *Mayrides*, that "guidelines are not rules binding on the parole board." And *Poluka* did, indeed, involve the same 98-page guidelines at issue here. The review court said "there was no legal basis for the trial court to declare the parole guidelines void."

As the court pointed out in both cases, the parole board retains discretion on a case-by-case basis as to whether to use the guidelines.

Therefore, the guidelines cannot be invalidated due to failure to follow the APA in their adoption. However, with or without guidelines, the parole board's discretion still is not without limits. The Supreme Court in *Layne* said "discretion must yield when it runs afoul of statutory based parole eligibility standards and judicially sanctioned plea agreements."

The court in *Layne* said it is not enough for the board to declare an inmate eligible for parole and to grant a hearing. At page 27, the court said " . . . the words 'eligible for parole' in former R.C. 2967.13(A) ought to mean something. Inherent in this statutory

language is the expectation that a criminal offender will receive meaningful consideration for parole."

The plaintiffs in the instant litigation have pointed out that these are still numerous situations in which inmates – although placed in the correct offense categories as required by *Layne* – are still being denied "meaningful consideration" for parole for unreasonable lengths of time (sometimes years) after becoming eligible for parole.

The guidelines set up a grid system for classifying an inmate for purposes of parole eligibility. As described in *Poluka* at page 3:

> "The vertical axis of the grid lists 13 categories of offenses, one being the least serious offense and 13 the most serious offense. The horizontal axis of the grid lists eight risk of recidivism factors. By determining the category of offense and risk of recidivism applicable to a particular inmate and then locating the intersection of those categories on the grid, the APA arrives at a range of months to be served by the inmate before he becomes eligible for parole."

While the grid may serve its purpose in most cases, inmates with higher level felonies may have years added on to their minimum sentences without any reasons to back up the length of time except an intersection on a chart. The resulting amount of time to be served may bear no relationship to the number of years an inmate could serve under the new law or to the sentence imposed by the trial judge. As pointed out by the plaintiffs, under the guidelines, even when assigned the correct category, and even with the lowest possible risk score, everyone convicted of voluntary manslaughter (by trial

or plea) must serve at least 7 years because the lowest possible range on the chart is 84 to 120 months. A judge may have imposed a minimum sentence (with eligibility in 3.5 years) but the sentence given – whether minimum or maximum – is not likely to have any effect on the OAPA's decision. The process presupposes that the sentencing judge had no factual findings or legal reasons to sentence the defendant as he or she did.

The *Layne* court re-affirmed that the OAPA has discretion to consider all the facts and circumstances relevant to parole consideration. This court fails to see how the chart itself is relevant (or why it should be used at all) when the offender's risk score is zero or close to it.

Layne said that while the OAPA retains broad discretion, it is not enough to simply say an inmate is eligible for parole. Parole eligibility is meaningless when the minimum term of a range exceeds the date of statutory eligibility. While *Layne* was addressing placement of inmates in the correct offense categories, the same injustice is occurring with inmates whose first meaningful chance at parole comes several years after eligibility due to the operation of The Guideline Chart. The inmate is being denied the essence of true parole eligibility i.e. meaningful consideration for parole.

The defense argues that the OAPA has, indeed, departed from the "discretionary" guidelines from time to time. Thus, the guidelines do not dictate parole eligibility. However, the number of downward departures is negligible. Certainly, they are not frequent enough to show that "meaningful" considerations are routinely occurring. To the contrary, the numbers show

that the OAPA has intentionally disregarded new statutory sanctions for the same offenses as well as the sentences rendered by judges. S.B. 2's new definite sentences coincide very closely with the old minimum ranges of indefinite sentences. But the OAPA's "guideline" usually trump all of the above.

Use of the guidelines to deny meaningful consideration at earliest eligibility not only violates the language of *Layne* and the doctrine of separation of powers, it denies rights of contract to inmates who entered negotiated plea agreements.

Most inmates who are subject to the new guidelines entered prison when the old matrix was being used and they had every reason to believe its use would continue. Plaintiffs justifiably relied on the OAPA's longstanding and widely publicized application of the matrix.

They were also told that "good time" could reduce their minimum sentences by one-third. But under current practices, good time means nothing. Good time might get an inmate a hearing at an earlier date than otherwise, but it does not affect the time an inmate must serve under the guidelines. The guidelines presume good time. So, good behavior will not yield a downward departure. Not only is "good time" gone, so is the likelihood of being granted parole at or soon after the time the inmate becomes eligible. Some are serving two or three times the length of time they would be serving for the same offense either under the new laws or the old parole policies.

A plea agreement is a contract between the state and the defendant. The law in effect at the time the contact is entered is part of the contract as well as the

usage and customs relied on by the defendants. The defendants performed their parts by waiving trials and entering pleas. However, in 1998, the state unilaterally changed the terms. Defendants have the right to expect that their parole considerations will be conducted under the same rules and policies that were being used when they entered their pleas.

The guidelines in use since 1998 have effectively imposed additional punishment and admittedly are being applied retrospectively. But because of the dictates in *Layne* and the basic law of contracts, the court need not address the "ex post facto" and other constitutional arguments advanced by the plaintiffs.

Therefore, the court hereby sustains plaintiff's Motion for Summary Judgment and issues the following declaratory judgment.

(1) That the plaintiff class is entitled by contract and by statute to meaningful parole consideration that consists of true eligibility (rather than mere paper eligibility) and a parole hearing that complies with the policies and practices adopted by the OAPA after the *Layne* decision.

(2) That the defendants deny plaintiff class members contract rights and meaningful parole consideration whenever they:

(a) Assign of class member a guideline range which has a minimum term that exceeds the length of time a class member must serve before becoming eligible for parole under the law in effect at the time of the plea;

(b) Assign a class member an offense category that does not correspond to the class member's offense (or offenses) of conviction, or assign a class member an offense category that nominally corresponds but which is elevated based upon the defendant's independent determination that the class member committed a distinct offense (such as kidnapping in connection with rape) for which he was not convicted;

(c) "Flop" a class member for more than five years;

(d) Deny a class member a hearing or re-hearing that complies with defendant's post-*Layne* practices and policies

The defendant is hereby ordered to immediately rehear and grant meaningful consideration for parole to any class member who has had his or her plea agreement contracts breached in the manner described above. And new hearings must be granted.